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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-6454

HOWARD MATTHESON,
Petitioner

VS.

STATE OF LOUISIANA,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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STATEMENT OF THE CASE

On March 1, 1978, petitioner Howard Mattheson and his wife, Willene Mattheson, visited the Hair Wiz Beauty Salon, located on Canal Street in New Orleans, Louisiana. The ostensible purpose of their visit was to obtain a hair cut and a manicure. Their real purpose was to observe the operation of the salon, as well as the number of customers and cash transactions occurring during a normal working day.

On March 9, 1978, eight days later, at approximately 4:45 p.m., they returned to the Hair Wiz and found a total of twenty-three employees and customers inside.

The victim, a seventy-year old receptionist, was seated behind the reception desk. Howard Mattheson pulled a

12-gauge double-barrelled sawed-off shotgun from under his coat and fired both barrels at the victim, blowing off the entire top of her head. Portions of the victim's brain matter and hair were discovered on the ceiling above the reception desk. Other pieces of skull and brain were strewn about the floor of the salon.

Mattheson then ordered a male employee of the salon to tape the hands of everyone in the salon, using adhesive tape Mattheson had brought with him.

When the employee ran out of tape, Mattheson forced all of the victims to lie down on the floor, some of them on top of each other. He and his wife then ripped all of the telephones from the walls. They emptied the purses of the victims and rifled the business' cash box. One woman refused to give up her purse, saying that Mattheson would have to shoot her first. Instead, Mattheson fired a shotgun blast through the leg of the woman next to her. At the time of the trial, that woman was still confined to a bed, having then endured five operations performed in an effort to save her leg.

Throughout the siege of the beauty salon, Mattheson shouted obscenities at the victims, whose number included two little girls only twelve and thirteen years old, threatening to kill more of them if they did not cooperate.

After leaving the scene Mattheson and his wife went to their apartment down the block from the beauty salon and changed their clothes. Leaving their weapons behind, they

went to a neighborhood restaurant where they were subsequently arrested.

Physical evidence linking Mattheson to the crime, including the credit cards of one of the robbery victims, was recovered at the restaurant when Mattheson and his wife were arrested. A search warrant was executed at their apartment where the murder weapon was recovered.

At trial, Mattheson was positively identified by victims of the crime. He took the stand in his own behalf. He fully admitted responsibility for the armed robbery but argued that the shotgun went off accidentally when the victim reached for it. He also testified that he was taking LSD and drinking large quantities of alcohol immediately prior to the crime. Rebuttal witnesses testified that the victim never reached for the gun prior to being shot and that the appellant did not appear intoxicated during or following the incident.

On June 1, 1978, a twelve member jury found Mattheson to be guilty of first degree murder. Following a bifurcated sentencing hearing, the jury unanimously recommended the death penalty. The jury found three aggravated circumstances in support of its recommendation:

1) The offender was engaged in the perpetration of an armed robbery;

2) The offender knowingly created a risk of death or great bodily harm to more than one person; and

3) The offense was committed in an especially heinous, atrocious or cruel manner.

On November 16, 1981, the Supreme Court of Louisiana upheld Mattheson's conviction and sentence. State v. Mattheson, 407 So.2d 1150 (La. 1981).

Mattheson is white and in his middle fifties. At the time of the instant crime, he was a fugitive from the State of Florida where he was on parole from a 1967 life sentence for armed robbery. Prior to 1967, he was convicted of armed robbery two additional times, once in 1957 in Hartford, Connecticut, when he was sentenced to serve from twelve to eighteen years, and once in 1952 in McAlester, Oklahoma, when he was sentenced to nine years. He also has two convictions for escape, three larceny convictions, one concealed weapon conviction and one burglary conviction.

His criminal record dates back to 1943 and involves fourteen separate incidents of arrest and nine separate periods of incarceration.

ISSUES FOR REVIEW

I. Whether pleas of guilty, the records of which fail to indicate representation by counsel, were properly admitted during the sentencing hearing.

II. Whether a defendant is entitled to invoke immunity to compel the testimony of a witness.

III. Whether the sentence of death must fall if a reviewing court holds that an aggravating circumstance was improperly found by the trial court.

ARGUMENT

I. Whether pleas of guilty, the records of which fail to indicate representation by counsel, were properly admitted during the sentencing hearing.

During the sentencing hearing following petitioner's conviction, the State introduced certified documents showing that petitioner previously had been convicted of three robberies and an aggravated assault. None of the documents revealed whether or not petitioner had been represented by counsel or had waived his Sixth Amendment rights.

Petitioner maintains that the failure of the State to demonstrate that petitioner's Sixth Amendment rights were protected when those earlier pleas were accepted made introduction of them reversible error. Petitioner bases his argument upon an analogy between the sentencing phase of a first degree murder trial and a sentence enhancement proceeding. The analogy does not bear upon under scrutiny.

In an enhancement proceeding, it is the fact of the prior conviction alone which produces an increase in sentence. On the other hand, during a sentencing hearing, the defendant's prior criminal history is simply part of a total picture of the character and propensities of the defendant and does not, of itself, trigger added penalties.

This Honorable Court directed in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and Gregg v. Georgia, 428 U.S. 153, 96 S.Ct.2909, 49 L.Ed.2d 859 (1976), that the sentencing body be apprised of all information relevant to

the imposition of sentence. The defendant's criminal history is surely relevant to that end.

As this Honorable Court pointed out in Lewis v. United States, 445 U.S. _____, 100 S.Ct. 95, 63 L.Ed.2d 298 (1980), uncounseled felony convictions are not invalid for all purposes. As the convictions were not used to enhance punishment but merely as part of the total picture of the character and propensities of petitioner, the Louisiana Supreme Court correctly ruled that the sethencing hearing is not one of those instances where the State is required to demonstrate that the defendant's prior convictions were obtained in full compliance with the Sixth Amendment.

It should also be noted that it is doubtful that introduction of the prior convictions had any impact upon petitioner. The three aggravating circumstances argued by the State and found by the jury are unrelated to Mattheson's prior convictions. Furthermore, it cannot be sincerely argued that the introduction of the convictions sullied petitioner in the eyes of the jury. The record is replete with other, unrelated testimony to the effect that petitioner is a bad man. When he took the stand, petitioner admitted that he was a parole violator from Florida. He also testified that he carried a sawed-off shotgun because he was paranoid about being a parole violator and thought he needed to use it to protect himself. He admitted to having taken LSD the morning of the murder. The jury had enough information from petitioner's own testimony to know that he was less than a model citizen. Introducing the prior convictions did him no harm whatsoever.

II. Whether a defendant is entitled to invoke immunity to compel the testimony of a witness.

Petitioner maintains that his wife should have been granted use immunity on the defense's motion and compelled to testify. Petitioner maintains that his wife would have testified that he did not intend to kill the victim and that he was intoxicated at the time of the killing.

It is indisputable that a witness can be compelled to testify under a grant of use immunity. Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). It is equally indisputable that claims for defense witness use immunity have been rejected by almost all of the United States Courts of Appeals which have considered the matter. This Honorable Court is directed to the lengthy treatment of the subject of defense witness immunity in United States v. Turkish, 623 F.2d 769 (2nd Cir. 1980). United States Circuit Judge Jon O. Newman's opinion offers an analysis of the countervailing interests involved in the issue of defense witness immunity, concluding that although further inquiry into the issue would be appropriate in an instance where the witness involved is not an indicted or potential defendant, "trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution." 623 F.2d at 778.

Petitioner's wife was an indicted defendant at the time of the trial. Therefore, there is no doubt whatsoever that the trial court properly refused to compel her testimony.

III. Whether the sentence of death must fall if a reviewing court holds that an aggravating circumstance was improperly found by the trial court.

At the sentencing phase of petitioner's trial, the jury found three aggravating circumstances. In brief to the Louisiana Supreme Court, petitioner conceded the existence of two of the three but offered argument as to the existence of the third, that the offense was committed in an extremely cruel, atrocious or heinous manner.

The Louisiana Supreme Court determined that because it was evident that the jury properly found one of the three aggravating circumstances (that the murder was committed during the perpetration of an armed robbery) that it was unnecessary for it to consider the sufficiency of the evidence of either the other undisputed circumstance of the one at issue here.

The Louisiana Supreme Court's circumlocution of the larger issue creates two subordinate ones: 1) whether the death penalty be upheld on the basis of only one statutory aggravating circumstance after the jury found three, and 2) whether the jury properly found the third aggravating circumstance.

The Louisiana Supreme Court announced its position on the first subordinate issue in State v.Monroe,397 So.2d 1258 (La. 1978), stating: (397 So.2d at 1276)

> "we know of no constitutional requirement that a death sentence be vacated whenever the jury errs in its finding of a statutory aggravating circumstance."

The Louisiana Supreme Court rejected out of hand the contrary position of the United States Court of Appeals for the Fifth Circuit set forth in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). This Honorable Court having granted certiorari in that case (Zant v. Stephens, No. 81-89), it cannot be stated with certainty what the abiding rule of law will be until this Honorable Court has ruled.

Stephens was convicted of murder and sentenced to death. After his conviction and sentence were affirmed on appeal to the Supreme Court of Georgia, he sought federal habeas corpus relief. The United States District Court for the Middle District of Georgia denied him relief, prompting his appeal to the United States Court of Appeals for the Fifth Circuit.

Among the aggravating circumstances found by the jury in returning the death penalty was "the offense was committed by one having a substantial history of serious assaultive criminal convictions." Subsequent to petitioner's conviction, that aggravating circumstance was ruled to be unconstitutionally vague. Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976).

Relying upon a series of cases commencing with Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 85 L.Ed. 1117 (1931), the Fifth Circuit held that because it was impossible to determine whether or not the jury relied upon the unconstitutional aggravating circumstance in returning the death penalty, the penalty could not stand. In Stromberg, a young woman was convicted under a statute parts of which were patently offensive under the First Amendment. Although one of the alter-

native theories of guilt under that statute was constitutional, this Honorable Court found that because the judge returned a general verdict which did not indicate which theory of guilt he relied upon,the conviction could not stand.

Similarly, the Fifth Circuit found that because it could not determine the extent to which the jury relied upon the unconstitutional aggravating circumstance, the penalty could not stand.

In Monroe, however, the Louisiana Supreme Court did not find the aggravating circumstance it rejected to be unconstitutional. Instead, the court determined that under the applicable jurisprudence, the facts of the case did not support a factual determination that the crime was committed in an "especially heinous or atrocious manner."

The Louisiana Supreme Court, torn between the conflicting opinions of the highest court of the State of Georgia and an intermediate federal court, chose to adopt as persuasive the opinion of the Georgia Supreme Court and reject Stephens v. Zant. Most importantly, the Louisiana Court noted no extraneous facts were brought before the jury determining Stephens' sentence even though the offensive aggravating circumstance was considered:

> ". . . under Georgia law, in capital cases, a defendant's criminal record is before the jury for its consideration regardless of whether it arguably evidences a 'substantial history of serious assaultive criminal convictions.' See Ga.Code Ann. §27-2503 (a). Thus, the jury would have been apprised of, and could have legally considered, Stephens' criminal record in any event."

In Monroe and the instant case, where the aggravating circumstance challenged on appeal was drawn solely from the facts of the case, it is clear that no external or arbitrary elements were brought into the jury's consideration. The jury was well aware of the brutal and callous manner by which petitioner murdered the victim and had every right to consider the facts of the case when determining whether or not to be merciful.

Stromberg and its progeny, Bachellor v. Maryland, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, L.Ed.2d 572 (1969); Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); relied on heavily by the Fifth Circuit in Stephens v. Zant, show a marked similarity in that they all stress two factors:

1) At least one alternate theory of guilt under a statute was patently unconstitutional; and

2) The verdict was of the type that it cannot be determined upon what theory of guilt the verdict was based.

The distinctions between the Stromberg strain and cases involving aggravating circumstances, and this case in particular, are clear.

Petitioner does not attack the heinousness aggravating circumstance because of any constituitonal infirmity. His attack is based upon jurisprudential limitations upon the

application of the circumstance which do not affect the jury's consideration of the totality of the facts of the case.

Because the second subordinate issue is easily resolved in favor of upholding the jury's finding of the aggravating circumstance, it is clear that the Louisiana Supreme Court's rejection of Stephens v. Zant if error was, at worst, harmless so far as petitioner is concerned.

In State v. English, 367 So.2d 815 (La. 1979), the Louisiana Supreme Court ruled that the aggravating circumstance at issue here must be narrowly construed so as to require "torture or the pitiless infliction of unnecessary pain on the victim." 367 So.2d at 823. The court relied upon this Honorable Court's decisions in Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) and Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1968). In a footnote to Profitt v. Florida, this Honorable Court commented favorably on the application of the aggravating circumstance to situations positively genteel in comparison of the murder committed by Howard Mattheson. Fn. 12, 428 U.S. at 255, 96 S.Ct. at 2968. The crime in Profitt itself consisted of a single stab to the chest with a butcher knife.

The true depravity of petitioner's crime which renders it especially atrocious, cruel and heinous lies not in the goriness of its execution, but in the horrendously senseless motive behind it. Petitioner murdered the receptionist at the Hair Wiz for no greater purpose other than to announce his

presence and to illustrate the seriousness of his purpose. Whatever pain felt by that elderly woman as the rational and sensual areas of her brain were ripped away by petitioner's birdshot was totally unnecessary, even in the value system of most armed robbers. The killing of the receptionist bore no recognizable relationship to the completion of his planned crime.

The jury, therefore, properly found the aggravating circumstance at issue. The issues presented in Zant v. Stephens do not even arise.

CONCLUSION

For the foregoing reasons, Howard Mattheson's Petition for Writ of Certiorari to the Supreme Court of Louisiana should be denied.

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CERTIFICATE OF SERVICE

I certify that a copy of this Brief in Opposition To Petition For A Writ Of Certiorari To The Supreme Court of Louisiana has been served upon petitioner by delivering a copy by hand to:

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